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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
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Amendment of Part 73 of the Commission's Rules Concerning the Filing of Television Network Affiliation Contracts	))))	MM Docket No. 95-40

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To: The Commission

REPLY COMMENTS OF MEDIA ACCESS PROJECT

Media Access Project ("MAP") respectfully submits these reply comments in the above referenced docket.

After examining the comments in this proceeding, MAP is compelled to ask why the Commission feels the need to revisit the "filing of affiliation contracts" rule, 47 CFR §73.3613-(a)("rule"). The rule is administratively simple and compliance is neither burdensome nor costly. Most importantly, however, it is a necessary tool for the public to monitor the performance of broadcast licensees related to the network-affiliate relationship. Without the ability to examine publicly-filed affiliation agreements, members of the public would have no way of knowing whether abuses exist.

However, at the urging of self-interested network parties, the Commission is considering several hypothetical "indirect costs" of the rule. Incredibly, the network commenters encourage the Commission to find that these costs outweigh the benefits of the rule, with not a shred of evidence showing that the costs even exist. In the 25 years of the rule's operation, including two comprehensive Commission reviews, there has been no mention made of these indirect costs for TV stations nor has the Commission or the networks objected to OMB renewal of these requirements. Moreover, the premise of the networks' arguments - that changes in the marketplace

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have made Commission and public oversight unnecessary - does not stand up to even cursory scrutiny.

I. THE BENEFITS OF PUBLIC MONITORING OF THE NETWORK-AFFILIATE RELATIONSHIP OUTWEIGH THE HYPOTHETICAL COSTS OF THE RULE'S CONTINUED OPERATION.

While the network commenters attempt to undervalue the benefits to *affiliates* from the disclosure of contract information, not one of them has mentioned the most important beneficiary: ***the public***. The Commission should not dismiss the importance to the public of full disclosure. There is "no reason to exclude those with such an obvious and acute concern as the listening audience" from participation in Commission proceedings. *UCC v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). Yet repeal of the rule would have exactly that effect.

Despite CBS's claim that it is not aware of any evidence suggesting that the general public makes any significant use of these filings, CBS Comments at 4, MAP has provided two recent examples of matters now pending before the Commission which would not have come to light without public access to affiliate contracts. MAP Comments at 3. There are many others as well. Indeed, it is likely that the public scrutiny brought about by the filing requirement actually ***prevents*** further abuses from occurring.

Capital Cities/ABC makes the fallacious claim that public monitoring of licensee performance is based primarily on programming, not program supply contracts. ABC Comments at 3-4. Putting aside the fact that licensing decisions are also based on such non-programming issues as financial qualifications and multiple ownership, the irony of this argument is that ABC and other network parties have on numerous occasions claimed a First Amendment right to be free of ***any*** oversight based on program content. *See, e.g.*, Comments of Capital Cities/ABC, In Re Review of the Prime Time Access Rule, MM Docket No. 94-123 (March 7, 1995) at 21-23.

The network commenters have completely failed to show that they incur great expenses in preparing and filing affiliation contracts. By their own admission, direct costs are "not a significant burden on any one licensee." CBS Comments at 4. CBS itself cites a 1985 commission finding that the burden of filing affiliation contracts was a mere 40 minutes per licensee. *Id.* at 5 n.7. *See also* MAP Comments at 5 (direct costs consist of postage and a few word processor keystrokes). CBS's claim that the filing burden is sizeable on the industry as a whole, CBS Comments at 4-5, is an exercise in distorted statistics: even a burden of a few minutes looks large when multiplied by 3800 licensees.

Nor have the network commenters provided any support for the Commission's hypotheses regarding the indirect costs of the filing requirement. *NOPR* at ¶15, 16. They applaud as "accurate" the Commission's first theory, *i.e.*, the idea that sharing information by affiliates may result in anticompetitive conduct. CBS Comments at 5; ABC Comments at 4-5. Yet they have no offered an iota of evidence to support this claim. The record contains no statistical data, no case studies, no economic models - nothing but the raw conjecture of self-interested parties seeking to escape public scrutiny of negotiations with their affiliates.[1]

Moreover, this alleged indirect cost is premised on the erroneous notion that all networks

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[1]As MAP has already demonstrated, sharing of contract information may occur even in the absence of the rule. MAP Comments at 7-8. The only difference is that it would be in a more clandestine manner. The parties likely to suffer from the change would be the public - which would no longer have a necessary tool in its policing of licensee public interest obligations - and the weaker affiliates. *See also*, Network Affiliated Stations Alliance Comments at 7 (demonstrating that networks have information on agreements with their own affiliates and have been able to obtain data on competitors' affiliation agreements)("NASA Comments").

are fungible. CBS poses this scenario:[2] if a local market has more networks offering affiliation than stations seeking affiliation, the stations can collude to raise their compensation levels.[3] CBS Comments at 5; *NOPR* at ¶15. But not all networks are created equal, as discussed at footnote 5, *infra* and MAP Comments at 11. Suppose, for example, that NBC, UPN, and WB were offering affiliation in a market which had two stations seeking affiliation. The significantly higher ratings of the shows in NBC's schedule would bring an NBC affiliate greater revenue from local and national spot advertising. Therefore, both stations would be more likely to compete with each other for the more valuable NBC affiliation than to maintain any anticompetitive agreements.

Of course, if the networks discover any future cases where sharing of information leads to instances of collusion, they may seek relief on a case-by-case basis through antitrust complaints at the Commission and the Justice Department. To seek repeal of an otherwise beneficial rule based upon unfounded fears of anticompetitive behavior is like swatting a fly with a sledgehammer.

Finally, as to the Commission's hypothesis that the rule discourages networks from creating "specialized contract terms" for affiliates with special needs, *NOPR* at ¶16, the network commenters have once again dropped the ball. They have offered not a shred of evidence that they have ever been dissuaded by the rule from offering specialized terms to affiliates or that

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[2]CBS does not even address another "indirect cost" mentioned by the Commission: collusion by the networks. *NOPR* at ¶15. Perhaps, this is because the networks already are an oligopoly. And like any oligopolistic group of sellers, there exists a power structure and the incentive to fix terms and prices. Yet if such coercion already existed, it would be a strong argument to ***retain*** the rule, not to discard it.

[3]Here once again, one would be hard-pressed to find ***actual proof*** that such instances would ever occur. UPN and WB, the new networks most likely to be seeking affiliates, have already finalized affiliation agreements for most of the largest markets.

they would offer more specialized terms if there were no rule. ABC Comments at 5; CBS Comments at 6.

II. THE RULE REMAINS NECESSARY BECAUSE THE NETWORKS CONTINUE TO ENJOY AND TO EXERCISE AN ADVANTAGE IN BARGAINING POWER OVER THEIR AFFILIATES.

The network commenters claim that the rule is obsolete because the affiliates are no longer the weaker parties in the network-affiliate relationship. For instance, CBS claims there has been a "sea change" which has rendered "anachronistic" the notion that networks have the ability to dominate their affiliates. CBS Comments at 2. It argues that one indication of the rising tide of the affiliates' fortunes was the affiliation switches which resulted from Fox's 1994 deal with New World. *Id.* at 2-3. The emergence of Fox, UPN, and WB, the networks assert, will give affiliates new alternatives and more bargaining power. NBC Comments at 1; ABC Comments at 3.

MAP has previously addressed these arguments at length. First, the affiliate switches of last year were isolated incidents unlikely to be repeated. MAP Comments at 10-11; MAP Comments, In Re Review of the Prime Time Access Rule, MM Docket No. 94-123 (March 7, 1995) at 7-9 ("MAP PTAR Comments").

Second, the risks of switching to one of the newer networks, especially UPN and WB, are enormous. Fox, UPN and WB programming achieves far lower ratings than programming from the major networks.[4] MAP Comments at 11; MAP PTAR Comments at 8 n. 8. Moreover,

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[4]In the May, 1995 sweeps, the performance of the big three networks and Fox dwarfed that of UPN and WB:

Network	Average prime time schedule rating/share
NBC	11.8/20

UPN and WB provide programming only for 1 or 2 prime time evenings; an affiliate of the other networks would lose 5 or 6 nights a week of high ratings by switching. Thus, affiliates who dare to exercise this so-called "bargaining power" are taking a huge financial leap of faith.

Affiliates' comments on the current state of network-affiliate negotiations not only illustrate the continued need for reporting of affiliation contracts, but also blow the lid off the networks' claim that affiliates have increased their negotiation power. For example, AFLAC has presented evidence that CBS has exerted pressure to prevent its Savannah, GA station from preempting its late night schedule to carry local sports event coverage and that NBC has circulated a "model agreement" which would severely penalize its affiliates from virtually all discretionary preemption. AFLAC Comments at 5-6. Similarly, the Network Affiliated Stations Alliance has shown that to preclude affiliates from switching, networks have made increasing use of 10 year contracts. NASA Comments at 6.

CONCLUSION

There is concrete proof that both the public and network affiliates benefit greatly from the filing of affiliate contracts rule. Meanwhile, the network commenters have provided no evidence to support, and there are many reasons to doubt, that the hypothetical "indirect costs" of

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ABC	11.5/19
CBS	10.1/17
Fox	7.0/12
UPN	3.2/5
WB	1.8/3

Tobenkin, "The May Sweeps: NBC first, CBS worst," Broadcasting and Cable, May 29, 1995, at 11. *See also*, Broadcasting and Cable, June 12, 1995, at 27 (Fox's highest-rated show for the week of May 29-June 4 placed 45th with a 7.6 rating/15 share, UPN's highest placed 79th with 3.9 rating/7 share, WB's placed 87th with a 2.0 rating/4 share).

the rule truly exist. For these reasons, the Commission should retain the rule in its current form.

Respectfully Submitted,

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July 12, 1995